OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 98-52 July 7, 1998

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Withdrawal of Recognition Cases

This memorandum supercedes OM 96-67, "Alternative Argument in the Withdrawal of Recognition Cases", dated October 23, 1996, and OM 98-34, "Withdrawal of Recognition Cases," dated May 1, 1998.

On May 15, 1998, in Chelsea Industries, Cases 7-CA-36846 et al., the Acting General Counsel filed a brief in response to the Board's notice and invitation to file briefs as to whether the Board should overrule Celanese Corp., 95 NLRB 664 (1951) and, if so, what standard the Board should use, and what implications the Supreme Court's decision in Allentown Mack Sales & Service v. NLRB, 118 S. Ct. 818, 157 L.R.R.M. 2257 (January 26, 1998), has on these cases. The Acting General Counsel, in arguing to the Board that the employer was not privileged to withdraw recognition from the union, made an alternative argument that the Celanese "reasonable good faith doubt" standard should be overturned. The Acting General Counsel argued that the Board should create a presumption that no employer may lawfully withdraw recognition from a certified bargaining representative unless, at a time when the employer is still honoring its bargaining obligation, a majority of the employees reject union representation in a Board-conducted secret ballot election at an appropriate time. The Chelsea brief only presented the analysis for withdrawal of recognition from certified unions, but noted that we would argue that the same rule applies to withdrawal of recognition from voluntarily recognized unions.

Further, in the Chelsea brief, the Acting General Counsel proposed that employer decertification petitions should be processed only where three conditions are satisfied: (1) there is direct evidence that at least 30 percent of the unit does not want union representation; (2) there is other evidence warranting a reasonable belief that other employees feel similarly; and (3) the objective evidence, viewed in its totality, supports a reasonable belief that the union no longer has the support of a majority. This standard for the processing of decertification petitions is a modification of the alternative argument suggested

by the Acting General Counsel in his brief to the Board in Lee Lumber and Building Material Corp., 322 NLRB 175 (1996), that only a 30 percent showing is necessary.

Accordingly, Regions should henceforth make the alternative argument presented in Chelsea, rather than the alternative Lee Lumber argument as directed in OM 96-67, in support of the otherwise meritorious withdrawal of recognition allegations involving a certified union. Similarly, in such cases, the Region should, as part of the Acting General Counsel's opening statement, indicate that the Region will be arguing the alternative Chelsea theory as one of its arguments. In new complaint cases, it is not necessary to include allegations other than the language contained in the pleadings manual under Section 605.2(e), Withdrawal of Recognition. However, Regions may find it advisable, given the particular circumstances, to further plead that the respondent lacked a good-faith doubt or that there was no actual loss of majority. In these circumstances, the Region should also initially plead or amend an outstanding complaint to include an allegation that the respondent has withdrawn recognition from the certified union at a time when a majority of the unit employees have not rejected the union in a secret-ballot election.

Further, Regions should no longer follow the instructions of OM 98-34, to submit to Advice all withdrawal of recognition charges except those where the Region finds that the withdrawal was tainted by unremedied unfair labor practices. Instead, Regions should dismiss charges where the Region finds that the employer has proof of actual loss of majority and has withdrawn recognition from a union, whether certified or voluntarily recognized, in an atmosphere free of unfair labor practices. Thus, it would not be appropriate to issue complaint solely on the Acting General Counsel's alternative theory in Chelsea, where the employer's withdrawal of recognition is lawful under existing case law. After dismissal of these charges, the Regions should process any representation petitions filed in these cases. Of course, absent a charge alleging unlawful withdrawal of recognition, the Regions should process representation petitions under the normal procedures.

However, the Regions should submit to the Division of Advice cases where the allegedly unlawful withdrawal of recognition is from a voluntarily recognized union, rather than a certified one, in circumstances where the Region has found the withdrawal would otherwise be unlawful because tainted by unremedied unfair labor practices. As noted above, the analysis for the alternative argument that such withdrawal is not privileged, absent an election, is different from that for withdrawal of recognition from a certified union.

Finally, Regions should continue to follow the direction of OM 98-16, "Cases Raising Allentown Mack Issues", dated March 6, 1998, to submit to the Division of Advice all cases alleging as unlawful the employer's withdrawal of recognition from a certified or voluntarily recognized union where the employer

asserts a reasonably-based good faith doubt that the union represented a majority of the unit. Since "good faith doubt" is the current law, Advice will consider how Allentown Mack affects the resolution of these issues.

A copy of the Chelsea brief will be transmitted to each office with the ROBS pickup on Friday, July 10, 1998.

If you have any questions concerning this memorandum, please contact Deputy Assistant General Counsel Jane C. Schnabel at (202) 273-2892.

R.A.S.

cc: NLRBU